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No. 02-628

In The Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, ET AL.,

Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATES OF UTAH, COLORADO, DELAWARE, HAWAII, IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, VERMONT, WISCONSIN, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. STATE OFFICIALS DO NOT WAIVE THE STATE'S ELEVENTH AMENDMENT IMMUNITY BY ENTERING A CONSENT DECREE, NOR DOES ENTRY INTO A CONSENT DECREE ENLARGE THE JURISDICTION OF FEDERAL DISTRICT COURTS	3
A. Entry Into A Consent Decree Pursuant To *Ex Parte Young* Does Not Waive Eleventh Amendment Immunity	3
B. The *Ex Parte Young* Doctrine Limits Federal Courts To Enforcing Federal Law	5
C. Entry Into A Consent Decree By State Officials Sued Pursuant To The Doctrine Of *Ex Parte Young* Does Not Enlarge The Jurisdiction Of Federal Courts	7
D. *Rufo v. Inmates Of Suffolk County Jail* Did Not Change The Constitutional Limits Of *Ex Parte Young, Pennhurst*, And *Rizzo* As They Apply To Suits Brought Against State Officials	8

TABLE OF CONTENTS – Continued

Page

II. THE FIFTH CIRCUIT'S RULING ON ENFORCEMENT PROCEEDINGS IS JUSTIFIED NOT ONLY BY THE LEGAL PRINCIPLES IN *EX PARTE YOUNG*, BUT ALSO BY THE PECULIAR NATURE OF INSTITUTIONAL REFORM LITIGATION CONSENT DECREES..... 11

A. As A Practical Matter, State Officials Often Have Little Choice But To Enter Into A Consent Decree When Faced With Protracted, Costly Litigation On Emotionally-Charged, Highly-Politicized Issues..... 13

B. The Assumption That State Official Defendants Fully Control Compliance With All Terms Of A Consent Decree Is Misguided... 15

III. THE FIFTH CIRCUIT'S APPROACH REMEDIES MANY OF THE CURRENT PROBLEMS PARTIES AND COURTS FACE WITH ENFORCING DECREES..... 17

A. Consent Decrees Should Not Be Enforced So As To Bind State Officials' Successors In Office..... 17

B. Modification Has Proven An Ineffective Tool For Relieving The Problems States Face In Attempting To Comply With Consent Decrees..... 22

IV. ALLOWING ENFORCEMENT OF A CONSENT DECREE ONLY AFTER A SHOWING OF AN ONGOING FEDERAL RIGHT VIOLATION IS A GOOD RESOLUTION FOR BOTH SIDES, AND WILL GIVE COURTS CLEAR GUIDANCE ON HOW TO APPROACH ENFORCEMENT ACTIONS 24

TABLE OF CONTENTS – Continued

Page

A. Adopting The Fifth Circuit Rule Will Not Spell The End Of Consent Decrees..... 24

B. Overturning The Fifth Circuit Ruling Will Make State Officials Less Willing To Enter Into Consent Decrees..... 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Boyd v. Alabama, 94 U.S. 645 (1876) 19

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) 25

Butler v. Commonwealth of Pennsylvania, 51 U.S. (10 How.) 402 (1850) 19

Cooper v. Noble, 33 F.3d 540 (5th Cir. 1994) 22, 23

Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) 12

Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc) 12, 21, 25, 27

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Gardner v. New Jersey, 329 U.S. 565 (1947) 4

Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944) 4

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 4, 5

John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001) 23, 24

Lapides v. Board of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002) 4

Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 7, 8, 9, 19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) ..... *passim*

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Stone v. Mississippi, 101 U.S. 814 (1879) 18

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 18

United States v. Bd. of Educ. of City of Chicago, 799 F.2d 281 (7th Cir. 1986) 12, 16

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 19

Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002) 5

West River Bridge Co. v. Dix, 47 U.S. (1 How.) 507 (1848) 19

Wyatt By and Through Rawlins v. Sawyer, 105 F. Supp. 2d 1234 (M.D. Ala. 2000) 12

CONSTITUTIONS

U.S. Const. Art. I, § 10 18

STATUTES

42 U.S.C. § 1973l(e) 25

42 U.S.C. § 1988 25

42 U.S.C. § 2000e-5(k) 25

OTHER AUTHORITIES

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) 20

TABLE OF AUTHORITIES – Continued

Page

American Public Welfare Association, *Review of Public Child Welfare Litigation in Selected Jurisdictions*, 21 (April 1998) 26

Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265 (1983) 11, 12, 15, 25

Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. of Chic. Legal F. 19 (1987) 25

Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987) ..... *passim*

Joseph F. DiMento & Dean W. Hestermann, *Ordering the Elephants to Dance: Consent Decrees and Organizational Behavior*, 43 J. Urb. & Cont. L. 301 (1993) 13, 15, 20

Judith Resnik, *Judging Consent*, 1987 U. of Chic. Legal F. 43 (1987) 14

Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977) 11, 15

Thomas M. Mengler, *Consent Decree Paradigms: Models without Meaning*, 29 B.C. L. Rev. 291 (1988) 14

INTEREST OF *AMICI*

Amici Curiae are States who have been or currently are parties to consent decrees. The *Amici* States have an interest in ensuring that the Eleventh Amendment guarantee of state sovereignty is consistently and appropriately enforced. The *Amici* States accordingly have an interest both in ensuring sovereign immunity is not presumed to be waived when a state official enters into a consent decree and that the jurisdiction of federal courts is not overstepped when consent decrees are enforced. The *Amici* States have the experience and history to provide the Court with information to help the Court understand the practical problems states face in attempting to comply with consent decrees their state officials have entered. In supporting Respondents, the State *Amici* intend not merely to echo the legal arguments Respondents make, but rather seek to provide the Court with a broader perspective of the implications of its decision on the states and their institutions.

SUMMARY OF ARGUMENT

This Court granted certiorari to address, in part, whether the law requires plaintiffs who bring an enforcement action to show an on-going violation of federal rights. The effect of this decision will be to decide if state officials who have entered into a consent decree in institutional reform litigation must comply with every provision of the decree – even if plaintiffs can no longer show an ongoing constitutional violation and even if violation of the provision does not violate a federal right. State *Amici* join the Respondents in urging the Court to determine that the law does not impose such a requirement on state officials. In

joining Respondents, State *Amici* first address the legal foundation of federal courts' jurisdiction over states and state officials: the *Ex parte Young* doctrine. The "legal fiction" of *Ex parte Young*, 209 U.S. 123 (1908), allows federal courts to exercise jurisdiction over state officials – who are otherwise immune from being sued in federal court – only to halt on-going federal rights violations and only so long as the remedy is limited to prospective injunctive relief which will prevent future violations. This fiction is dissolved when federal courts enforce consent decree provisions that do not directly bear upon federal rights violations.

This basic legal premise is presented against the backdrop of a broader discussion of the problems states face in attempting to comply with consent decrees entered into pursuant to *Ex parte Young*. State officials frequently have little choice but to enter into a decree when faced with litigation alleging federal violations. The decrees themselves are typically complex and detailed, aiming to eliminate problems that bureaucrats have struggled with for years. Full compliance with all decree provisions is extremely difficult for officials to achieve for many reasons. Third parties may fail to cooperate. Budget shortfalls may impede progress. And even if every provision is achieved, there is no guarantee that alleged violations will be remedied.

While states struggle, often for decades, to comply with consent decrees, state governments begin to lose their ability to function democratically. That is, policy choices and budget decisions are frozen until every provision of a decree is complied with. Newly-elected or appointed officials and state legislatures lose their ability to make changes as a changing electorate and economy dictate. In such cases, federal courts, rather than state officials,

essentially run major state institutions. The *Ex parte Young* doctrine was created to prevent this very spectacle of federal courts dictating how states run their agencies. Only when officials are violating citizens' federally secured rights may federal courts order state officials to act. Upholding the Fifth Circuit's ruling will ensure that federal courts direct state action only when there is federal violation and only so long as necessary to prevent future violations.

ARGUMENT

I. STATE OFFICIALS DO NOT WAIVE THE STATE'S ELEVENTH AMENDMENT IMMUNITY BY ENTERING A CONSENT DECREE, NOR DOES ENTRY INTO A CONSENT DECREE ENLARGE THE JURISDICTION OF FEDERAL DISTRICT COURTS.

A. Entry Into A Consent Decree Pursuant to *Ex Parte Young* Does Not Waive Eleventh Amendment Immunity.

Plaintiffs who bring suit against state officials seeking prospective, injunctive relief for alleged violations of federal rights – rights created under the federal constitution or federal law – do so pursuant to the *Ex parte Young* doctrine. *Ex parte Young* confirms the supremacy of federal law and provides a vehicle for vindicating federal rights without impugning state sovereignty. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). A suit brought pursuant to *Ex parte Young* thus avoids Eleventh Amendment and other sovereign immunities. *Ex parte Young*, 209 U.S. at 159-60. This is because the action is brought against state officials, not against the state or

its entities. *Id.*; *Pennhurst*, 465 U.S. at 100-103. A suit properly brought under *Ex parte Young* must allege an ongoing violation of federal law and must seek only prospective injunctive relief. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring).

When state officials enter into a consent decree to settle a case brought under *Ex parte Young*, there is no basis for a court to presume a waiver of Eleventh Amendment immunity. Such a waiver may be found only when state actors remove a case to federal court, after having waived immunity in state court, *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623-24 (2002), when the state itself voluntarily appears in federal court, *see Gardner v. New Jersey*, 329 U.S. 565, 572-73 (1947), or when the state's consent to suit is unequivocally asserted in an express declaration of waiver made by the state. *Pennhurst*, 465 U.S. at 99; *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). When a state official enters a consent decree, waiver of sovereign immunity cannot be presumed because the suit is proceeding under *Ex parte Young* and because the state is not a party. For an official to waive the state's immunity, he or she must have actual authority to make the waiver. If the official does have such authority, there must nonetheless be an express waiver in the decree, such as "The State hereby waives its right to assert sovereign immunity as a challenge to the District Court's authority to enter or enforce this Decree." Absent such an express statement and authority to make the waiver, a state official does not waive the State's Eleventh Amendment immunity simply by entering into the decree. State officials thus must be free to assert the state's sovereign immunity if, later, plaintiffs seek through

enforcement actions to reach beyond the *Ex parte Young* fiction. *See Pennhurst*, 465 U.S. at 102-03 ("[T]he Eleventh Amendment bars some forms of injunctive relief against state officials. . . . ") (citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974)).[1]

B. The *Ex Parte Young* Doctrine Limits Federal Courts To Enforcing Federal Law.

The Constitution limits jurisdiction of federal courts over claims not based on federal law. In *Pennhurst*, the Court held that state officials may not be sued in federal courts for violations of state law. 465 U.S. at 106. Plaintiffs wishing to enforce state-created rights may not do so in federal courts. That is because when the rights sued upon are grounded in state law, the *Ex parte Young* rationale – which vindicates federal rights and the supremacy of federal law – is absent and the state's sovereign interest becomes predominant once again. *Id.* at 120 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the states. *Coeur d'Alene*, 521 U.S. at 267-68. *Ex parte Young*'s requirement – that plaintiff alleges an ongoing violation of federal law and requests prospective injunctive relief – is necessary. "Were it otherwise, the Eleventh Amendment, and not *Ex parte Young* would become the legal fiction." *Verizon Md., Inc. v. Public*

[1] The distinction made by State *Amici* that the actions of state officials sued pursuant to *Ex parte Young* do not bind the state *qua* state is critical, because often courts and parties discussing state official defendants will use the shorthand "state defendants" or "states," thus blurring the critical distinction.

Serv. Comm'n of Md., 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). This is especially problematic in institutional reform litigation consent decrees, which invariably include ambitious reform measures that are not based in federal or state law. *See infra*, Part III.

The *Pennhurst* Court recognized the "'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.'" *Pennhurst*, 465 U.S. at 104 n.13 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976)) (quotation omitted). Because litigation over enforcement of consent decrees almost always involves issues of how a state must run its agencies beyond taking measures that directly bear upon federal rights, *Pennhurst* is especially germane.

Similarly, in *Rizzo*, the Court limited injunctive enforcement of federal law when that enforcement hampered city officials' ability to exercise the discretionary authority vested in them by state and local law. 423 U.S. at 378-81. The Court found that the plaintiff in *Rizzo* failed to establish the named defendants had violated federal law, *id.* at 376-77, and went on to conclude that the injunction was inconsistent with the doctrine of equitable restraint. *Id.* at 378-80. The Court concluded that "important considerations of federalism" weighed against the injunction. *Id.* at 378.

These cases illustrate this Court's willingness to strike down relief ordered pursuant to *Ex parte Young* when that relief exceeds the carefully drawn boundaries of federal courts' authority over local and state government. The same limitations should apply to enforcement of consent decrees against state officials since those decrees are entirely premised on *Ex parte Young*.

C. Entry Into A Consent Decree By State Officials Sued Pursuant To The Doctrine Of *Ex Parte Young* Does Not Enlarge The Jurisdiction Of Federal Courts.

Petitioners and their *Amici* argue that because federal courts may enter a consent decree that requires state officials to do more than federal law requires, courts must also be able to enforce those decrees.[2] They rely principally on *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), in which the Court held that "a federal court is not necessarily barred from *entering* a consent decree merely because the decree provides broader relief than the court could have awarded after trial." *Id.* at 525 (emphasis added). The assumption that entry of a consent decree necessarily grants power to enforce all provisions of the decree is erroneous. The *Firefighters* Court made it clear that just because a decree could be validly entered did not mean that the decree provisions were insulated from later legal challenge: "The fact that the parties have assented to the relief contained in a decree *does not render their actions immune from attack*." *Id.* at 526 (emphasis added).

Reliance on *Firefighters* for the proposition that federal courts can enforce any and all consent decree provisions in an *Ex parte Young* suit is also misplaced because the case is distinguishable from the present case. Although a consent decree case, *Firefighters* was a suit against a city and municipal officials pursuant to Title VII

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[2] State *Amici* do not address Petitioner's argument that the District Court in the present case could properly enter the consent decree, which has been addressed in Respondents' opposition brief.

of the Civil Rights Act. *Id.* at 504. It did not involve state officials and did not implicate *Ex parte Young*, *Pennhurst*, or the Eleventh Amendment. In *Firefighters*, the Court concluded that the consent decree did not violate the limits placed by Title VII on the remedial authority of a federal court. *Id.* at 526. In contrast, when enforcement of a consent decree *would* defy the law upon which the case is brought – in this case by violating the *Ex parte Young* doctrine – the federal District Courts must be barred from enforcing the offending provisions.

D. *Rufo v. Inmates Of Suffolk County Jail* Did Not Change The Constitutional Limits Of *Ex Parte Young*, *Pennhurst*, And *Rizzo* As They Apply To Suits Brought Against State Officials.

Petitioners and their *Amici* also rely on *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Significantly, unlike the unlitigated consent decree in the instant case, the consent decree in *Rufo* was negotiated and entered into only after a lengthy trial and findings by the District Court that defendants' actions violated the Fourteenth Amendment. *Id.* at 372-73. *Rufo* also involved injunctive relief against a county, not state officials.[3] The consent decree in *Rufo* was entered into only after bitter litigation, including two appeals of collateral orders to the First Circuit, during which the Court of Appeals reaffirmed the finding of ongoing constitutional violations. *Id.*

[3] In *Rufo*, the one state official defendant did not appeal the District Court's decision holding he was a proper party. *Rufo*, 502 U.S. at 373 n.2.

at 373 n.2, 374. The defendants sought to modify the decree, which was a very specific agreement aimed at correcting established, ongoing constitutional violations. *See id.* at 376. When the lower courts refused modification of the consent decree, this Court reversed, and clarified the standard for modification. *Rufo*, which merely clarifies modification, cannot control a question of enforcement of a consent decree entered without a finding of a constitutional or statutory violation and involving state officials sued pursuant to *Ex parte Young*.

Notably, the *Rufo* Court twice observed that constitutional violations had been found. *Id.* at 389. The Court's further discussion, concerning the decree obligations assumed by the defendants, must be read in the context provided by the Court. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements. . . . " *Id.* at 389. This portion of *Rufo* addresses whether a change in law would open the door to relitigate the prior finding of unconstitutionality underpinning the consent decree. It does not bear upon whether enforcement of a provision of an unlitigated consent decree can be challenged in a later enforcement proceeding.

The *Rufo* Court concluded by noting that, "accordingly, the District Court did not abuse its discretion in *entering* the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution." *Id.* at 389 (emphasis added). Like *Firefighters*, *Rufo* commented on the District Court's ability to *enter*, not *enforce* consent decrees.

Because of the nature of institutional reform litigation, and the issues addressed in pre-litigation consent decrees entered into between plaintiffs and state officials, it is likely that some of the provisions of the consent decrees will reach beyond the limits of *Ex parte Young*, *Pennhurst*, and *Rizzo*. As Justice White observed in *Rufo*, "almost any affirmative decree beyond a directive to obey the Constitution necessarily does that." *Id.* at 389. Plaintiffs in consent decrees, like Petitioners in the instant case, might find themselves with an unenforceable decree provision, not founded on federal law, unless they can show an ongoing federal right violation. Petitioners argue such a result – having an unenforceable consent decree provision – would be intolerable. On the contrary, what would be intolerable would be to ignore the important constitutional limits of *Ex parte Young, Pennhurst*, and *Rizzo*.

Moreover, plaintiffs in consent decrees will not be the first to find themselves with a legally unenforceable claim. This was precisely the situation of the plaintiff in the case which gave shape to Article III of the Constitution and confirmed the principle of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). While recognizing that Mr. Marbury was entitled to his political appointment, this Court concluded it could not grant a remedy because it lacked jurisdiction. *Id.* at 168, 175-80. *Amici* States ask this Court to reaffirm the important constitutional principles articulated in *Ex parte Young, Pennhurst, Rizzo*, and *Marbury*.

II. THE FIFTH CIRCUIT'S RULING ON ENFORCEMENT PROCEEDINGS IS JUSTIFIED NOT ONLY BY THE LEGAL PRINCIPLES IN *EX PARTE YOUNG*, BUT ALSO BY THE PECULIAR NATURE OF INSTITUTIONAL REFORM LITIGATION CONSENT DECREES.

Plaintiffs bringing suit against state officials for prospective, injunctive relief pursuant to *Ex parte Young*, do so to impact a variety of state-run institutions, including schools, prisons, and human service agencies. Frequently, whether the state agency is actually violating a federal right – either based in a federal statute or in the Constitution – is difficult to determine, and there is a wide range of policy alternatives that might eliminate the problems alleged in the initial complaint. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 438 (1977) (discussing this problem in the context of mental health law). Once suit is brought, however, debate over the proper policy choice to ameliorate problems in a state institution shifts from the political arena to the courts. This shifting of policymaking from the public, political arena to the courts is one of the most salient, and most troubling, features of institutional reform litigation. *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1267 (1983).

Institutional reform consent decrees are also marked by their complexity and long duration. *Id.* The decrees typically contain a host of highly detailed requirements. *Id.* The specific provisions are usually "extensive . . . in their commands," prescribing not only "one or two acts, but a whole course of conduct." *Id.* Because of their complexity, institutional reform decrees are often difficult to

implement and interpret. *See, e.g., United States v. Bd. of Educ. of City of Chicago*, 799 F.2d 281, 283 (7th Cir. 1986) (observing that a decree mandating a school desegregation program was "fraught with problems of interpretation and implementation" throughout its (then) six-year history). Moreover, because their provisions require complex remedial action, "[institutional reform] decrees often remain in place for extended periods of time." *Rufo,* 502 U.S. at 380. In fact, a sampling of consent decrees currently in force reveals decrees that have spanned up to 30 years. *See* Appendix A. Further, because decrees of long duration are more likely to face "significant changes," *Rufo*, 520 U.S. at 380, the potential for conflicts between the parties to a decree often increases the longer the decree remains in place. In fact, unlike typical settlement agreements, consent decrees entered into in an effort to settle institutional reform suits often mark the beginning, not the end, of protracted litigation. *See, e.g., Evans v. City of Chicago*, 10 F.3d 474, 482 (7th Cir. 1993) (en banc) (plurality opinion) ("Attempts to enforce this consent decree have not produced the peace that settlement brings. There have been 16 years of noisome litigation."); *Dixon v. Barry*, 967 F. Supp. 535, 538 (D.D.C. 1997) (detailing the over 15-year history of the *Dixon* decree, the court noted, "while the Court saw the 1980 Order as the . . . end of the litigation, in hindsight, . . . the 1980 Order was only the beginning"); *Wyatt By and Through Rawlins v. Sawyer*, 105 F. Supp. 2d 1234, 1236 (M.D. Ala. 2000) ("This litigation has traveled a long, winding, and often quite bumpy course. . . . ").

In short, the complexity and longevity of institutional reform decrees make the reformation of public institutions by decree "a more hazardous venture than it is frequently made out to be." Horowitz, *supra*, at 1288. The complexity

of such a venture is fraught with more legal complications when, as in the case at bar, the underlying suit has been brought only through the limited vehicle of the *Ex parte Young* doctrine. When a federal court finds constitutional or federal statutory violations, enforcement of the terms of a decree against state officials that remedy the violation remains faithful to *Ex parte Young*. However, in unlitigated consent decrees, whether a federal right has actually been violated has not been established, and the alleged violation may have been eliminated. Or, there may be no guarantee that the action mandated in the decree will actually eliminate any violations. Not only does enforcement of the decree provision in such circumstances violate *Ex parte Young*, but enforcement is also likely to rest on misconceptions about the state officials' level of compliance and actual control over achieving compliance, and the voluntary nature of their entry into the decree. Such assumptions ignore the reality of consent decrees.

A. As A Practical Matter, State Officials Often Have Little Choice But to Enter Into A Consent Decree When Faced With Protracted, Costly Litigation On Emotionally-Charged, Highly-Politicized Issues.

A state official's entering into an unlitigated consent decree in institutional reform litigation may be voluntary in the strictly legal sense, but as a practical matter, state officials often have little choice. Commentators have recognized that officials are backed into a corner when faced with an institutional reform suit. Consent decrees are "often forced upon an agency without consideration of the agency's ability" to comply. Joseph F. DiMento & Dean W. Hestermann, *Ordering the Elephants to Dance: Consent*

Decrees and Organizational Behavior, 43 J. Urb. & Cont. L. 301, 307 (1993). It is well understood that the plaintiff, through the threat of litigation and potentially of judgment, "holds the trigger" throughout settlement negotiations and thus dominates the bargaining process. Judith Resnik, *Judging Consent*, 1987 U. of Chic. Legal F. 43, 74 (1987).

Defendants may have many reasons for feeling compelled to settle an institutional reform lawsuit. They may hope to curtail expenses, though given the extensive litigation in many consent decree cases, that hope may not often be realized. *See* Resnik, *supra*, at 69 ("[W]e cannot say with certainty that the net costs [of consent decrees over litigation] are less. . . . "). They may wish to avoid adverse publicity, or defendants who believe they have broken no law nonetheless might wish to implement socially beneficial reforms. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models without Meaning*, 29 B.C. L. Rev. 291, 322-23 (1988). With a court order behind them, officials might believe they will be able to obtain additional funding from the legislature and "obedience to the agreement from lower level employees." Resnik, *supra,* at 74. Like any other defendant, state officials simply wish to avoid the time and expense of litigation. But unlike private parties, state officials are motivated to settle to avoid the public perception that by litigating an institutional reform suit, they are callous to the needs of children, the elderly, or other vulnerable groups.

B. The Assumption That State Official Defendants Fully Control Compliance With All Terms Of A Consent Decree Is Misguided.

Underlying Petitioners' argument that District Courts have the authority to enforce every provision of a consent decree is an unspoken assumption that the state officials who are required to comply with the decree actually have the ability to ensure compliance. This assumption ignores the enormous complexity of public institutions. Problems in institutions are "frequently so complex that even bureaucrats and other non-judicial experts in the field have failed to resolve them." *Implementation Problems*, *supra*, at 428. The complexity of large organizations is a more important factor in the difficulties encountered in implementing consent decrees than is incompetence or deliberate resistance. *See* Horowitz, *supra*, at 1296. Significant action by an organization requires the coordination of its internal components and frequently the cooperation of various external institutions, groups or systems. *Id.* Many forces and interests, some not necessarily represented in the litigation, must come together before the intended goals of the consent decree can be achieved. *See id.* The decree's implementation will depend on organizations that often lie beyond the reach of the court issuing the decree. DiMento & Hestermann, *supra*, at 323. Even if the state officials are actually able to comply with the decree, "there is no guarantee that its goals will be met." *Id.*

The reality of institutional reform litigation is that fully implementing all provisions of a consent decree is often far more complex and difficult than anticipated. Plaintiffs unwilling to accept institutional limitations and

to renegotiate more workable consent decree terms often turn to enforcement proceedings. Unfortunately, the enforcement proceeding does not necessarily produce the fix plaintiffs desire. As one court observed, "the history of this decree is notable not for its success[,] . . . but for what it has illuminated about the character and limitations of the executive, municipal, and judicial institutions involved." *Board of Educ. of Chicago*, 799 F.2d at 283.

Another barrier for state officials trying to comply with exacting consent decrees is budget constraints. Even if officials are able to obtain sufficient funding to attempt to meet terms of the decree, other state agencies pay a heavy price. The impact of consent decrees is that, often, the relationships between competing agencies' interests results in distortions in the allocation of government resources between the different entities. *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 269-71 (1987). As Justice O'Connor observed:

> Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else. While the lack of resources can never excuse a failure to obey constitutional requirements, it *can* provide a basis for concluding that continued compliance with a decree obligation is no longer "equitable."

Rufo, 502 U.S. at 396 (O'Connor, J., concurring) (emphasis in original). "In the real world . . . officials in different agencies at different levels of authority are engaged in continuous pulling and hauling over resources, priorities, and subtle gradations of policy. A consent decree can be an

all too ready handle for officials at one level to manipulate their superiors or rivals . . . . " Rabkin & Devins, *supra*, at 271.

Whether or not a provision of a consent decree can actually be carried out more often than not involves factors beyond the control of the individual state official who is named. The complexity of the problem the decree is aimed at remedying, the lack of cooperation by third parties, and budget constraints may all hinder compliance with decree terms. These obstacles are not always expected or understood by the parties when they enter the decree. In such cases it makes neither legal nor common sense for state officials to comply with every provision of a decree originally agreed upon unless there is an ongoing federal violation.

III. THE FIFTH CIRCUIT'S APPROACH REMEDIES MANY OF THE CURRENT PROBLEMS PARTIES AND COURTS FACE WITH ENFORCING DECREES.

A. Consent Decrees Should Not Be Enforced So As To Bind State Officials' Successors In Office.

Given that institutional reform consent decrees are complex, difficult to comply with, and often last for decades, they very frequently have the effect of binding state officials to policies to which their predecessors (often reluctantly) agreed. This Court has long recognized that enforcing a contract against a state government which binds the hands of successors in office cannot be tolerated in a democracy:

> [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

Stone v. Mississippi, 101 U.S. 814, 820 (1879). The Constitution itself was created with this principal in mind, as Justice Brennan has noted: "The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Even while enacting the Contract Clause in Article I – which forbids the states from passing laws that limit contractual obligations[4] – the Framers recognized that the Constitution should not trump the doctrine of sovereign immunity. *See* Rabkin & Devins, *supra,* at 211 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934)). From the principle of sovereign immunity

[4] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const. Art. I, § 10.

flows the recognition that contracts cannot be enforced so as to hinder a state's ability to carry out basic governmental functions.

Thus, this Court has held that the Contract Clause must give way to sovereign immunity if enforcing a contract against a state will impair that state's ability to exercise its governmental powers or unnecessarily bind successors in office. *See West River Bridge Co. v. Dix*, 47 U.S. (1 How.) 507, 531-32 (1848) (holding Contract Clause could not be applied to state contract so as to override states' power of eminent domain); *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402, 416-18 (1850) (holding Contract Clause could not prevent states from enacting legislation modifying state officials' tenure because ability to control officials' tenure "is indispensable for the preservation of the body politic"); *Boyd v. Alabama*, 94 U.S. 645, 650 (1876) ("We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare. . . . ").

Consent decrees, like any settlement agreement, are essentially contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract. . . . "). Just as with contracts, consent decree provisions that unnecessarily hinder states from carrying out their governmental functions or bind successors-in-office should not be enforced. *See* Rabkin & Devins, *supra,* at 209 (noting that Court's decision in *Firefighters* "reaffirms that what parties cannot agree to in ordinary contracts, they cannot make binding through consent decrees.").

Yet state government's ability to adopt policy, legislation, and budgets is increasingly compromised when District Courts enforce provisions of consent decrees where there is no evidence of a constitutional violation. With consent decrees frequently spanning decades, they bind not only the successors to the originally named state officials, but also the state legislators and other appointed and elected officials. Decisionmaking is transferred from the political arena to the courts. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976) ("[I]n actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager."). Successors to the originally-named official defendants are bound by policies and procedures they had no role in implementing and with which they may disagree. *See, e.g.*, DiMento & Hestermann, *supra*, at 307 ("[P]otentially unrepresentative decrees bind successors in office, despite their lack of adequate representation in the negotiation process and their failure to assent to the provisions of the decree."). When government defendants enter into a consent decree, debate on major public policy issues is frozen and successors in office are bound until every provision of the decree is achieved.

The result is that "one administration . . . commit[s] its successors to policies they might not otherwise have chosen. And it presents the risk that major policy decisions will be fixed in secret negotiations with small groups of private plaintiffs rather than through the more open and accountable procedures of ordinary executive decisionmaking." Rabkin & Devins, *supra*, at 204. Such binding of

successors is a common problem. Indeed, the United States, which has filed an amicus brief supporting the Petitioners in this case, has often argued against enforcement of consent decrees that it claimed would tie the hands of the executive branch. *See, e.g., id.* at 257-58. Although the Fifth Circuit decision this Court is reviewing involved state officials, not "the state" as a defendant, consent decrees naming heads of state agencies and divisions, and often the governor of the state as well, are, for purely practical purposes, suits against the state and its agencies. These consent decrees stretch the *Ex parte Young* legal fiction almost to the breaking point.

At least one Federal Court of Appeals judge has expressed concern that District Courts are not vigilant in ensuring that consent decree provisions are not enforced so as to bind successors. *Evans*, 10 F.3d at 482 (en banc) (plurality opinion) (noting that "a hectored district judge, eager to reach the next case in the queue" may fail to consider critical principles such as "preserving democratic governance, separating the judicial and political spheres, [and] respecting state autonomy in the absence of a federal rule" when enforcing consent decree provisions). Adopting the Fifth Circuit's ruling, which requires plaintiffs to show that violating a provision of a consent decree also violates a federal right, would properly preserve state governments' ability to function democratically, while vindicating the supremacy of federal law.

B. Modification Has Proven An Ineffective Tool For Relieving The Problems States Face In Attempting To Comply With Consent Decrees.

In its amicus brief, the United States recognizes that "[a] State that has entered into a decree may have legitimate reasons for wanting to be relieved of obligations imposed by a consent decree," *see* Brief for the United States as Amicus Curiae, at 19, and suggests that states can simply seek modification under the standard this Court announced in *Rufo*.[5] However, the *Rufo* standard is difficult to meet.

The *Rufo* standard was intended to allow District Courts more flexibility in modifying institutional reform consent decrees, *see* 502 U.S. at 383, and allows courts to modify a decree if the party seeking modification shows either a significant change in law or fact. *Id.* at 384. The *Rufo* standard, however, has not necessarily eased the enforcement problems defendants face. For example, in *Cooper v. Noble*, 33 F.3d 540 (5th Cir. 1994), defendants argued both factual changes – a new prison had been built that had improved prison conditions – and legal changes – a newly released Supreme Court decision made it plain that some provisions of the decree were not constitutionally required. *Id.* at 543-44. The court refused to modify the decree, holding defendants failed to show the factual changes affected their ability to comply with the decree

[5] The United States made the same mistake as many observers, assuming the defendant to a consent decree is "the state" when in fact the defendants are state officials.

and ruling that under *Rufo* the court had the authority to enforce a provision exceeding constitutional requirements. *Id.* at 544-45. Similarly, in *John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001), the state defendants sought modification of a consent decree governing compliance with federal Early Periodic Screening, Diagnosis and Treatment requirements, arguing both changes in fact, and that the decree was unworkable because defendants could not force third-party insurers to participate. *Id.* at 812. The district court refused to modify the decree, even while recognizing that "the current Remedial Plan is unworkable." *Id.*

Even though *Rufo* was designed to make modification a viable option for government defendants in institutional reform decrees, District Courts have tended to interpret *Rufo* to mean that courts *can enforce* provisions of consent decrees against government defendants even if the provision exceeds constitutional requirements. *See, e.g., Cooper*, 33 F.3d at 544-45 (holding that under *Rufo* the district court had the authority to enforce a decree provision exceeding constitutional requirements).

District Courts have also tended to interpret *Rufo* to limit, rather than expand, the circumstances when modification is appropriate. In *Menke*, for example, the district court held:

> Modification of a consent decree is appropriate: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when a decree proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest."

Menke, 176 F. Supp. 2d at 811 (quoting *Rufo*, 502 U.S. at 384). While *Rufo* did enumerate these three examples of when modification "may be warranted," *Rufo*, 502 U.S. at 384, *Rufo* did not state that these were the only circumstances when a district court should modify a decree. *See id.* The very problem that Justice O'Connor predicted in her concurring opinion, that "[p]ortions of the Court's opinion might be read to place new constraints on the District Court's discretion," *id.* at 397 (O'Connor, J., concurring), has been realized.

IV. ALLOWING ENFORCEMENT OF A CONSENT DECREE ONLY AFTER A SHOWING OF AN ONGOING FEDERAL RIGHT VIOLATION IS A GOOD RESOLUTION FOR BOTH SIDES, AND WILL GIVE COURTS CLEAR GUIDANCE ON HOW TO APPROACH ENFORCEMENT ACTIONS.

A. Adopting The Fifth Circuit Rule Will Not Spell The End Of Consent Decrees.

Petitioners and their Amici claim plaintiffs will never want to enter into consent decrees if the Fifth Circuit rule is adopted. Petitioners' Brief at 41-42; Brief for the United States as Amicus Curiae at 19; Brief for the AARP, et al., as Amicus Curiae at 26-27. But if all plaintiffs in institutional reform litigation against state officials took every case to trial, they would only be entitled to prospective injunctive relief necessary to eliminate any violation of federal right that plaintiffs were able to prove at trial. In other words, plaintiffs lose nothing under a rule requiring them to show an ongoing violation of federal rights when seeking enforcement of a consent decree provision. "Recognizing that a substantial federal claim must undergird a

consent decree does not make plaintiffs less willing to settle: the decree still provides relief, which may be tailored more closely to the parties' circumstances than a remedy of the judge's devising could be." *Evans*, 10 F.3d at 482 (en banc) (plurality opinion).

The economic model of settlement supports this conclusion. If parties can gain the same, or better remedy, through negotiations, than they can through the expenses of discovery and a full-blown trial, while avoiding the uncertain results of trial, plaintiffs will still elect to settle. "The settlement saves these costs, which the parties can divide, making each better off than it expects to be after a trial." Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. of Chic. Legal F. 19, 19 (1987).

Plaintiffs will also be motivated to continue entering into consent decrees by the need to collect attorneys' fees. The lifeblood of private attorneys general lawsuits is the fee-shifting provisions of many federal statutes. *See* Horowitz, *supra*, at 1276. Many of the statutes plaintiffs sue under in institutional reform litigation, such as 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1973l(e), require plaintiffs to secure a change in the legal relationship between the parties through a court order to be deemed a prevailing party. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602-05 (2001). Consent decrees qualify as a court order. *Id.* at 604.

In some cases, a federal rights violation may be remedied before trial. *See id.* at 608-09. By refusing to negotiate a consent decree when state officials are willing, plaintiffs might find themselves in a situation in which

state officials resolve federal rights violations during the protracted discovery phase of litigation, leaving plaintiffs without a judgment or order, and hence no attorney fees. Plaintiffs would gain the satisfaction of having eliminated a federal rights violation, but would be deprived of critical fee awards. Even if some provisions of a consent decree are ultimately unenforceable, plaintiffs would still fair better by settling than by litigating.

B. Overturning The Fifth Circuit Ruling Will Make State Officials Less Willing To Enter Into Consent Decrees.

States locked into consent decrees find themselves spending millions of dollars, not only on attempting to implement decree provisions, but also on paying the costs for monitors to track compliance, or for special masters the court may have ordered to create plans to achieve decree provisions. *See, e.g.*, American Public Welfare Association, *Review of Public Child Welfare Litigation in Selected Jurisdictions*, 21 (April 1998). After many years of learning these difficult lessons, state officials are already less willing to enter decrees that may prove unworkable. As one state official involved in implementing a child welfare consent decree put it when asked to give advice to other states, "Consent decrees ... are a dead end." *Id.* at 26. Another suggested, "Instead of entering into a consent decree, litigate or negotiate a settlement agreement." *Id.*

If this Court rules that every provision of a consent decree will be enforceable, regardless of whether there is any remaining constitutional violation, then states will certainly be less willing to enter into decrees. Consent decrees are by and large instruments which specify how a state is to go about the difficult task of reforming complex

bureaucratic organizations to meet federal legal requirements. With the standard for modification set at a high level, it is important that enforcement actions be limited to actual, ongoing federal rights violations.

Even if upholding the Fifth Circuit Court of Appeals decision results in state officials entering fewer consent decrees, such a result is a price worth paying.

> [S]ettlement is not an end in itself. It is a means of resolving disputes harmoniously. Many things are more important: preserving democratic governance, separating the judicial and political spheres, respecting state autonomy in the absence of a federal rule.... Settlements purchased at the cost of putting the court in control of state and local budgets come at too high a cost.

Evans, 10 F.3d at 482. Basic democratic principles should not be sacrificed merely for fear that there will be fewer consent decrees with state official defendants.

CONCLUSION

The State *Amici* respectfully ask this Court to uphold the Fifth Circuit Court of Appeals' decision. Institutional reform consent decrees have become a part of state governments' operation. There is no doubt that these agreements have benefited both plaintiffs and state defendants. But states bogged down in decades-old decrees requiring detailed, exacting performance of complex tasks, when there has never been any adjudication of a federal violation, reasonably wish to place limits on decree provisions that can be enforced against them. The *Amici* States have attempted to dispel the appearance that states knew

exactly what they were getting into when they entered a decree and simply have buyers' remorse. The reality is that reforming institutions is incredibly complex and difficult. Neither plaintiffs nor defendants know if the reformation plan formalized in a decree will actually work. State official defendants should not be bound by every provision of a decree unless the plaintiff can show an actual constitutional or federal statutory violation. Upholding this rule will allow plaintiffs and state official defendants in decrees to focus on improving state institutions and shift the focus away from litigating over enforcement.

Respectfully submitted,

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APPENDIX A

Table of Representative Current Consent Decrees

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
Milburn v. Coughlin	79cv5077 (S.D.N.Y.)	1980	1991	Medical treatment of disabled inmates at state Correctional Facility	Woods v. Goord, 2002 WL 731691, *7, n.13 (S.D.N.Y.) (detailing history of the Milburn decree).
Reynolds v. Alabama Dept. of Trans.	Civ. 85-T-665-N (M.D. Ala.)	1994	2000	Discriminatory employment practices	Reynolds v. Alabama Dept. of Trans., 84 F. Supp. 2d 1339 (M.D. Ala 2000) (extending length of decree for an additional 4 years).
Dixon v. Barry	Civ. A.74-285 (D.D.C.)	1980	1992, 1997	Care of disabled individuals in D.C. hospital	Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (detailing history of the decree and ordering appointment of a special receiver to oversee implementation of the decree).
Reese v. Evans	Civ. 82-1251 (N.D. Ga.)	1982	1998	Various aspects of prison conditions, including renovation and expansion	
Rolland v. Cellucci	CV. A. 98-30208 (D. Mass.)	2000		Treatment conditions of disabled individuals in nursing homes	Rolland v. Cellucci, 191 F.R.D. 3 (D. Mass. 2000) (approving settlement agreement); Rolland v. Cellucci, 198 F. Supp. 2d 25 (D. Mass. 2002), aff'd, 318 F.3d (1st Cir. 2003) (allowing plaintiff's motion for further relief under consent decree).
Rosen v. Tennessee Com'r. of Finance and Admin.	3:98-0627 (M.D. Tenn.)	2001		Administration of state's managed health care program	Rosen v. Tennessee Com'r of Finance and Admin., 204 F.Supp. 2d 1048 (M.D. Tenn. 2001), aff'd, 288 F.3d 918 (6th Cir. 2002) (granting plaintiffs' motion to enforce the decree).

Table of Representative Current Consent Decrees (cont.)

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
Shakman v. Democratic Organization of Cook County	69C.2145 (N.D. Ill.)	1972, 1983		Elimination of hiring practices based on political patronage by various government defendants	Shakman v. Democratic Organization of Cook County, 569 F. Supp. 177 (N.D. Ill. 1983) (approving consent order); Shakman v. Democratic Organization of Cook County, 607 F. Supp. 1086 (N.D. Ill. 1985) (amending order); Shakman v. Democratic Organization of Cook County, 2001 WL 1155274 at *1 (N.D. Ill.) (noting that "the 1972 and the 1983 Consent Judgments remain in full force and effect.").
Handschu v. Special Services Div.	71 Civ. 2203 (S.D.N.Y.)	1985	2003	Surveillance operations of New York City Police Department	Handschu v. Special Services Div., 605 F. Supp. 1384 (D.C.N.Y. 1985), aff'd, 787 F.2d 828 (2d Cir. 1986) (approving consent decree). 2003. Handschu v. Special Services Div., 2003 WL 1529197 (S.D.N.Y.) (modifying consent decree).
Benjamin v. Fraser	75 Civ. 3073 (S.D.N.Y.)	1980	2000	Procedural safeguards for classifying inmates as requiring enhanced restraint status	Benjamin v. Kerik, 102 F. Supp. 2d 157 (S.D.N.Y. 2000), aff'd, 264 F.3d 175 (2d. Cir. 2001) (modifying decree in light of Prison Litigation Reform Act of 1995); Benjamin v. Fraser, 2002 WL 31845111 (S.D.N.Y.) (finding defendants in contempt for failing to comply with decree provisions).
Emma C. v. Eastin	C96-4179 (N.D. Cal.)	2000		School district and state's department of education compliance with IDEA	Emma C. v. Eastin, 2001 WL 1180636 (N.D. Cal.) (finding school district in contempt for failing to comply with decree and discussing history of litigation).

Table of Representative Current Consent Decrees (cont.)

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
John B. v. Menke	3:98-0168 (M.D. Tenn)	1998		Provision of early childhood preventative care under state health program	John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001) (appointing special master to oversee state's compliance with decree and detailing consent decree provisions).
David C. v. Leavitt	93-C-206 (D. Utah)	1994	1999	Institutional reform of child welfare agency	David C. v. Leavitt, 242 F.3d 1206 (10th Cir. 2001), cert. denied, 534 U.S. 822 (2001) (holding that district court's extension of decree's original four-year period was permissible.)
Felix v. Lingle	93-00367 (D. Haw.)	1994	2000	State agency's compliance with IDEA	
U.S. v. Hawaii	91-00137 (D. Haw.)	1991		Conditions at state psychiatric facility	
Makin v. Hawaii	98-000997 (D. Haw.)	2000		Timely provision of Medicaid services to disabled individuals	